Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ABDUL AZIZ KAHN, *et al.*,
*Petitioners*,

v.

JOHN D. ASHCROFT,
Attorney General of the United States,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

The Refugee Act of 1980 ("**the Act**") was codified in response to the United States' agreement to comply with the substantive provisions of the United Nations Convention Relating to the Status of Refugees.[1] The Act included a new statutory procedure, codified at INA § 208(a), 8 U.S.C. 1158(a), which vested the Attorney General with discretionary authority to grant asylum to persons meeting the definition of "refugee" and eliminated the Attorney General's discretion in cases involving withholding of deportation. A disagreement in the federal circuits now exists, following this Court's decision in *INS v. Cardoza-Fonseca*,[2] regarding whether an asylum seeker has a burden of proof before the Attorney General is expected to exercise discretion to grant or deny asylum.

In *INS v. Cardoza-Fonseca*, this Court recognized an incongruity in the decisions from the federal circuits due to a failure to distinguish between the burden of proof in a withholding of deportation case and the burden of production in an asylum case. This Court held an alien seeking withholding of deportation had to prove that more likely than not, he would suffer a "clear probability of persecution" if he were deported, but an asylum seeker *was not required to demonstrate by a preponderance of the evidence* that there was a "clear probability" or that he had a "well-founded fear" of persecution. However, the Act imposed an obligation upon an asylum seeker to tender evidence that he had a well-founded fear of persecution. Unfortunately, the Court remained silent on what burden of proof or burden of production was required, if any, an asylum seeker had to satisfy before the Attorney General exercised discretion. The Attorney General's own regulations concerning eligibility for

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[1] 19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968).

[2] 480 U.S. 421 (1987).

asylum contributes to the confusion by referring to a burden of proof, but seemingly describes an alien's burden of production.[3] Therefore, the question presented herein is:

> Whether an alien's due process rights are violated by the Attorney General's refusal to exercise discretion to grant or deny asylum where the alien satisfied his burden of production by offering subjective and objective evidence concerning his well-founded fear of persecution, but the Attorney General questioned the credibility of the testimony and documents submitted by the alien and held he failed to satisfy his burden or proof.

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[3] *See generally*, 8 C.F.R. 208.13(a) (2004).

## PARTIES TO THE PROCEEDING

Abdul Aziz Kahn ("**Kahn**") and Hina Parveen, and their children, Abdul Majeed Kahn, Muhammad Fareed Kahn, Nida Parveen, and Zahida Perveen, collectively referred to as "**Petitioners**," applied to the Attorney General for asylum in the United States. Petitioners were the moving parties before the Executive Office of Immigration Review, the Board of Immigration Appeals, and the United States Court of Appeals for the Fourth Circuit.

John Ashcroft, former Attorney General of the United States, was named in his official capacity as the chief official of the United States Department of Justice. The Immigration and Naturalization Service ("**INS**"), which formerly fell under the authority of the Department of Justice, was dissolved on March 1, 2003.[4] The Homeland Security Act transferred the responsibility for the adjudication of asylum applications to United States Bureau of Citizenship and Immigration Services ("**USCIS**").[5] The INS or USCIS opposed Petitioners applications for asylum before the Executive Office of Immigration Review, the BIA, and the United States Court of Appeals for the Fourth Circuit.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioners are not a publicly held company, subsidiary, or affiliated business organization that has issued shared to the public. No other publicly held business organization has a direct financial interest in this litigation.

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[4] Homeland Security Act of 2002, codified at 6 U.S.C. § 101, *et seq.* (Supp. II 2004).

[5] 6 U.S.C. 271(b) (Supp. II 2004).

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDINGS | iii |
| RULE 29.6 DISCLOSURE STATEMENT | iii |
| TABLE OF AUTHORITIES | vii |
| INTRODUCTION | 1 |
| OPINION BELOW | 2 |
| JURISDICTION | 2 |
| RELEVANT CODE AND RULE PROVISIONS | 3 |
| STATEMENT OF THE CASE | 8 |
| Factual Background | 8 |
| Proceedings Below | 10 |
| REASONS FOR GRANT THE WRIT | 12 |
| I. GRANTING PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NECESSARY TO SETTLE A CONFLICT AMONG THE FEDERAL CIRCUITS CONCERNING THE APPLICATION OF THE REFUGEE ACT OF 1980 AS IT RELATES TO ASYLUM CASES | 12 |
| A. Burden of Proof in Asylum Cases before 1987 | 12 |
| B. Uncertainty regarding burden in asylum cases | 13 |
| 1. Burden of Proof | 14 |
| 2. Burden of Persuasion | 15 |
| 3. Burden of Going Forward | 15 |
| 4. Burden of Production | 15 |

TABLE OF CONTENTS—Continued

Page

C. Implementation of the Refugee Act of 1980 has produced uncertainty concerning which burden an alien must satisfy before the Attorney General must exercise his discretion ..... 16

D. The effect of the ongoing conflict in the law on the Petitioners' asylum case ..... 20

II. SOUND LEGAL POLICY COMPELS THE CREATION OF A FRAMEWORK FOR ASSESSING WHETHER AN ALIEN HAS SATISFIED THE BURDEN OF PRODUCTION ..... 21

CONCLUSION ..... 23

Appendix A—Bench Decision and Order of Immigration Judge ..... 1a

Appendix B—Order of the Immigration Judge ..... 12a

Appendix C—Per Curiam Order of Board of Immigration Appeals ..... 16a

Appendix D—Per Curiam Decision of United States Court of Appeals for the Fourth Circuit ..... 18a

## TABLE OF AUTHORITIES

CASES — Page

*Ahmadshah v. Ashcroft*, 396 F.3d 917 (8th Cir. 2005) ..... 19
*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 22
*Ambrose v. Wheatley*, 321 F. Supp. 1220 (D. Del. 1971) ..... 14
*Awale v. Ashcroft*, 384 F.3d 792 (8th Cir. 2004) ... 19
*Barnes v. U.S.*, 412 U.S. 837 (1973) ..... 15
*Berishaj v. Ashcroft*, 378 F.3d 314 (3rd Cir. 2004) ..... 19
*Brosnan v. Brosnan*, 263 U.S. 345, 349 (1923) ..... 14
*Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004) ..... 19
*Chen v. Ashcroft*, 376 F.3d 215 (3rd Cir. 2004) .... 18
*Cobb v. Pozzi*, 363 F.3d 89, 101 (2nd Cir. 2004) .. 22
*Commercial Molasses Corp. v. NY Tank Barge Corp.*, 314 U.S. 104 (1941) ..... 14, 15
*Diab v. Ashcroft*, 397 F.3d 35 (1st Cir. 2005) ..... 18
*Director v. Greenwich Collieries*, 512 U.S. 267 (1994) ..... 14, 15, 17
*D-Muhumed v. U.S. A.G.*, 388 F.3d 814 (11th Cir 2004) ..... 18
*El-Sheikh v. Ashcroft*, 388 F.3d 643 (8th Cir. 2004) ..... 19
*Ememe v. Ashcroft*, 358 F.3d 446 (7th Cir. 2004) .. 19
*Gontcharova v. Ashcroft*, 384 F.3d 873 (7th Cir. 2004) ..... 19
*Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1978) ..... 15
*Hernandez-Barrera v. Ashcroft*, 373 F.3d 9 (1st Cir. 2004) ..... 18-19
*Hill v. Smith*, 260 U.S. 592 (1923) ..... 14
*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ..... i, 1, 12, 13, 17, 21

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140 (2nd Cir. 2003) | 19 |
| *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004) | 19 |
| *Kondakova v. Ashcroft*, 383 F.3d 729 (8th Cir. 2004) | 18 |
| *Konigsberg v. California*, 366 U.S. 36 (1960) | 15 |
| *Leia v. Ashcroft*, 393 F.3d 427 (3rd Cir. 2004) | 19 |
| *Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004) | 19 |
| *Michael v. Slattery*, 852 F. Supp. 211 (S.D.N.Y. 1994) | 19 |
| *Mukamusoni v. Ashcroft*, 390 F.3d 119 (1st Cir. 2004) | 18 |
| *Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994) | 19 |
| *Radio Corp. of America v. Radio Engineering Laboratories Inc.*, 293 U.S. 1 (1934) | 14 |
| *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2nd Cir. 2004) | 18 |
| *Shire v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004) | 19-20 |
| *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) | 15, 16 |
| *Sandstorm v. Montana*, 442 U.S. 510 (1979) | 15 |
| *Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004) | 18 |
| *This Is Me, Inc. v. Taylor*, 157 F.3d 139 (2nd Cir. 1998) | 22 |
| *We Biao Chen v. INS*, 344 F.3d 272 (2nd Cir. 2003) | 18 |
| *Webre Steib Co. v. Commissioner*, 324 U.S. 164 (1945) | 14 |
| *Wiramsame v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004) | 20 |
| *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004) | 19 |
| *Zhang v. U.S. INS*, 386 F.3d 66 (2nd Cir. 2004) | 18 |

TABLE OF AUTHORITIES—Continued

BIA DECISIONS — Page

*In Re A.E.M.*, 21 I&N Dec. 1157 (BIA 1998) ..... 20
*In Re M.D.*, 21 I&N Dec. 1180 (BIA 1998) ..... 18
*In Re O.D.*, 21 I&N Dec. 1079 (BIA 1998)..... 20

TREATIES

19 U.S.T. 6223, 6259-6276, T.I.A.S. No. 6577 (1968)..... i

STATUTES

6 U.S.C. § 101 (Supp. II 2004) ..... iii
6 U.S.C. § 271 (Supp. II 2004) ..... iii
8 U.S.C. § 1101 (2001 & Supp. II 2004) .....3, 4, 16
8 U.S.C. § 1158 (2001) ..... 4, 16
28 U.S.C. § 1254 (2001) ..... 2

REGULATIONS

8 C.F.R. § 208.13 (2004) .....ii, 4-8, 16, 17
8 C.F.R. § 208.14 (2004) ..... 8, 17

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 50..... 22
Fed. R. Civ. P. 52..... 22

OTHER SOURCES

BLACK'S LAW DICTIONARY (8th ed. 2004)..... 15

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## INTRODUCTION

Petitioners respectfully petition this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit and to provide direction on a critical and recurring question arising under the immigration laws of the United States. This Court held in *INS v. Cardoza-Fònseca*[1] that the burden of proof for withholding of deportation and asylum cases was not the same and clearly defined the *prima facie* elements of an asylum claim. The decision left unanswered, however, what (if any) burden of proof and/or burden or production an asylum seeker must

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[1] 480 U.S. 421 (1987).

satisfy before invoking the mandatory exercise of the Attorney General's discretion to grant or deny asylum. Hence, the federal circuits and Board of Immigration Appeals ("**BIA**") have issued inconsistent decisions. It is for this reason that Petitioners pray this Court to issue a writ, and after considering the matter, hold that (1) there is no burden of proof in an asylum case; (2) the Attorney General must exercise his discretion to grant or deny asylum after an asylum seeker has tendered a *prima facie* case; and (3) the Attorney General's failure to exercise discretion after a *prima facie* case has been made constitutes a violation of the asylum seekers Due Process rights under the United States Constitution.

## OPINIONS BELOW

The unpublished Bench Decision and Order of the Immigration Judge and Order of the Immigration Judge are reproduced in the Appendix to this Petition ("**App.**") at 1a-15a, Apps. A and B,[2] respectively. The unpublished *Per Curiam* Order of the Board of Immigration Appeals ("**BIA**") for Kahn is reproduced at App. at 16a-17a, App. C. The unpublished *Per Curiam* Opinion of the United States Court of Appeals for the Fourth Circuit is reproduced at App. 18a-24a, App. D.

## JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its per curiam opinion on December 29, 2004. Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) (2001). Further, pursuant to Supreme Court Rule 10(c), the question presented herein sets out an

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[2] All of the Petitioners relied upon the evidence offered by Kahn to support their cases for asylum. Therefore, only the orders pertaining to Kahn have been reproduced in the Appendix. The Orders of the Immigration Judge and *Per Curiam* Order of the BIA for the other Petitioners were identical to the material produced herein.

important question of federal law, which has not been, but should be, decided by this Court.

## RELEVANT CODE AND RULE PROVISIONS

8 U.S.C. § 1101(a)(42) (2001 & Supp. II 2004).

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be

deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. § 1158(a) (2001).

(a) Authority to apply for asylum.

(1) In general. Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

8 CFR § 208.13(a) & (b) (2004).

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that

country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution. (i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-

founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1)(i), (b)(1)(ii), and (b)(2) of this section, adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. Those factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless

> the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

8 C.F.R. 208.14(a) (2004).

> By an immigration judge. Unless otherwise prohibited in § 208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act.

## STATEMENT OF THE CASE

**Factual Background**. Abdul Aziz Kahn ("**Kahn**") is a native of Pakistan. Before coming to the United States, Kahn had always lived in a home owned by the Pakistani government located at the airport in Karachi, and he was employed by Pakistan International Airlines ("**PIA**") as the driver for Nasine Kahn, the airline's general manager.[3] In approximately 1985, Kahn joined the Mottahida Quami Movement ("**MQM**"), a political organization opposed *inter alia* to the Pakistan Muslim League ("**PML**").[4] Kahn was an active member of the MQM until he and his family fled from Pakistan in October of 2000.[5] MQM is a minority political party in Pakistan, and its members are frequently subjected to arrest, beatings, torture, interrogation, and sometimes murder at the hand of the PML.[6] In addition to Kahn being a member of the MQM, three of his brothers, his cousins, and several of his friends were also members of the MQM.[7]

As an employee of the PIA, Kahn was afforded opportunities to travel to the United States in 1989, 1990, 1991, 1992,

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[3] Court of Appeals Record Extract ("R.E.") at 82, 97.

[4] *Id.*; *see also* R.E. at 112.

[5] R.E. at 92, 112-113.

[6] R.E. at 92; *see generally*, R.E. at 114-143.

[7] R.E. at 103.

and 1999. The purpose of Kahn's travel was for pleasure; he would remain here for approximately two months, and would then return home to his family in Pakistan.[8] Despite Kahn's opposition to the government, he was always able to secure the necessary exit visas and his passport was never revoked.[9]

In 1995, Kahn was arrested two times. On the first occasion, Kahn was detained for three days, and on the second occasion, for approximately two hours. Both times, Kahn was beaten and interrogated by the police, who were seeking information on other members of the MQM. In 1996, Kahn was arrested a third time and held for a week.[10]

Kahn also actively assisted the MQM, throughout his membership, by soliciting members and introducing them to the MQM's leadership. In 1997 and 1998, Kahn actively assisted the MQM in elections by setting up stages, decorations, lighting, and other tasks associated with the campaigns. In late July of 2000, Kahn learned that Nasine Kahn had been arrested, and Kahn actively feared his arrest was imminent.[11] In response, the Petitioners prepared to flee from Pakistan. On October 15, 2000, the Petitioners arrived in the United States on visitors' visas.[12] Shortly thereafter, Kahn learned from his brother that the police were looking for him and claimed to have an arrest warrant.[13]

Based upon his prior experience of: (1) persecution at the hands of the government; (2) the PML's persecution of the MQM; (3) the arrest and detention of Nasine Kahn; and (4) the news that the police had a warrant for Kahn's arrest,

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[8] R.E. at 94.

[9] R.E. at 102-03.

[10] R.E. at 84, 96.

[11] R.E. at 86-87, 104.

[12] R.E. at 88.

[13] R.E. at 85.

Kahn testified at the hearing before the Immigration Judge that he believed that his life and health were at risk, due to his political beliefs and affiliation, if he was removed to Pakistan. Kahn also testified that he did not believe moving to another part of the country would ameliorate the imminent danger he faced from the PML's persecution of MQM's members.[14]

**Proceedings Below**. Petitioners appeared with counsel before the Honorable John F. Gossart, Immigration Judge for the Baltimore District ("**Immigration Judge**"), on July 11, 2002, and December 17, 2002. In holding that Petitioners were not eligible, *inter alia*, for asylum, the Immigration Judge observed:

> The letter from the MQM indicated that the respondent was attacked by Muslim extremists. There is absolutely no mention in the respondent's application, nor, in fact, his application or his testimony today regarding any such alleged attacks.
>
> The documents that the respondent presents to the Court are not reliable documents. No chain of custody has been offered to the Court to lend credence and reliability on these documents. There has been no authentication. There is no reliability. There is no foundation for these documents. In fact, the Court merely has copies of documents and no original documents of record.
>
> * * *
>
> The respondent was employed by the Pakistan International Airlines and represented under cross-examination that this is a government job, that he lived in government quarters. It is not particularly plausible to the Court that the respondent, who represents he was arrested and detained on three separate occasions, who has an outstanding warrant for his arrest from the very same government that apparently employed him and provided him housing.

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[14] R.E. at 89.

> The Respondent was able to secure the necessary documentation to leave his country without any apparent difficulty or burden.
>
> Quite simply, this case falls far short of the required evidence and corroboration to establish a bona fide claim for asylum, withholding or removal, or protection under the protection against the Convention Against Torture.
>
> The Court does not find the respondent's representations to be particularly plausible. His representations are limited, unconvincing, weak, and lacking in persuasive detail.
>
> There is very limited corroboration in the record. In fact, the only corroboration is an indication or membership, with no corroboration regarding arrest, detention, abuse, or in fact a warrant.
>
> * * *
>
> In this record, the Court concludes, that the respondent has failed to meet his burden of proof, to be accorded asylum . . . These applications are denied to him and denied to his family as dependents.[15]

The Petitioners appealed the Immigration Judge's decision to the BIA. On April 15, 2004, the BIA affirmed the Immigration Judge's decision in a *Per Curiam* Order.[16] Petitioners then timely filed a Petition for Review in the United States Court of Appeals for the Fourth Circuit, which declined to review the BIA's decisions in the Petitioners' cases in an unreported *Per Curiam* Opinion issued on December 29, 2004.[17]

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[15] App. at 8a-10a, App.A.

[16] App. at 16a-17a, App. C.

[17] App. at 18a-24a, App. D.

## REASONS FOR GRANTING THE WRIT

### I. GRANTING PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NECESSARY TO SETTLE A CONFLICT AMONG THE FEDERAL CIRCUITS CONCERNING THE APPLICATION OF THE REFUGEE ACT OF 1980 AS IT RELATES TO ASYLUM CASES.

Certiorari is advisable in this matter to produce certainty and uniform application of the Immigration Law as it pertains to aliens seeking asylum. The unsettled question is whether an alien must satisfy a burden of proof and/or a burden of production before the Attorney General is required to exercise his discretion to grant or deny asylum. Misapplication of the law has created numerous Due Process violations where, as in this case, the Attorney General simply failed to exercise his discretion. This is in contrast to complaints that the Attorney General abused his discretion or erred in finding insufficient evidence was offered. Discordant application of the law has produced controversy in most federal circuits, as well as intra-circuit disagreements.

#### A. Burden of Proof in Asylum Cases before 1987.

The genesis of this problem lies in this Court's decision in *INS v. Cardoza-Fonseca*. In that case, this Court was asked to determine whether an alien seeking asylum pursuant to INA § 208(a) had the same burden of proof as an alien seeking withholding of deportation pursuant to INA § 243(h). In withholding of deportation, an alien must demonstrate that "more likely than not" he will suffer a "clear probability of persecution" if deported to his native homeland.[18] In holding that an asylum seeker had a lesser burden of proof, this Court held "'the persecution or well-founded fear of persecution' standard governs the Attorney General's determination

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[18] *INS v. Cardoza-Fonseca*, 480 U.S. at 430.

whether an alien is eligible for asylum."[19] In reaching the conclusion that the standards for withholding of deportation and asylum were different, the Court reasoned:

> In contrast, the reference to "fear" in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien. "The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference . . . We simply cannot conclude that the standards are identical."
>
> * * *
>
> The BIA agrees that the term "fear," as used in this statute, refers to "a subjective condition, an emotion characterized by the anticipation or awareness of danger." That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As one leading authority has pointed out:
>
> "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp . . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return."[20]

**B. Uncertainty regarding burden in asylum cases.**

The difficulty created by the Court's holding that "the persecution or well-founded fear of persecution standard gov-

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[19] *Id.* at 428.

[20] *Id.* at 430-31.

erns" an asylum seeker's eligibility for relief is that the Court did not clarify whether this was a "burden of production," a "burden of going forward," a "burden of persuasion," or a "burden of proof," and, if a burden of proof, what would satisfy the burden. Because it is unclear which burden, if any, is applicable, the Attorney General is left without direction as to when he must exercise his direction.

### 1. *Burden of Proof.*

The burden of proof has often been used to describe two concepts:

> (1) the burden of persuasion, which under the traditional view never shifts from one party to the other, at any stage of the proceedings, and (2) the burden of going forward with the evidence, which may shift back and forth between the parties as the trial progresses.[21]

However, due to much confusion over the use of the term, this Court has expressed a preference to limit the meaning of "burden of proof" to only the "burden of persuasion."[22] Thus, for example, in deciphering the meaning of "burden of proof" in § 7(c) of the Administrative Procedures Act ("**APA**"), this Court held "We interpret Congress' use of the term 'burden of proof' in light of this history, and presume Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment."[23] Unfortunately, however, others have been less consistent utilizing the term burden of proof.

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[21] *Ambrose v. Wheatley*, 321 F. Supp. 1220, 1222 (D. Del. 1971); *see also, Director v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

[22] *Id.* at 274-75; *see also Webre Steib Co. v. Commissioner*, 324 U.S. 164, 171 (1945); *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 314 U.S. 104, 111 (1941); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 7-8, (1934); *Brosnan v. Brosnan*, 263 U.S. 345, 349 (1923); *Hill v. Smith*, 260 U.S. 592, 594 (1923).

[23] *Director v. Greenwich Collieries*, 512 U.S. at 275.

### 2. *Burden of Persuasion.*

The party with the burden of persuasion must convince the fact-finder to view the facts in a way that favors that party. Usually in civil cases the moving party must prove his case "by a preponderance of the evidence," while criminal cases are subjected to the higher standard of "beyond a reasonable doubt."[24] The party bearing the burden of persuasion retains that burden throughout the duration of the case, regardless of whether the burden of going forward shifts.[25]

### 3. *Burden of Going Forward.*

The burden of going forward has been described as being the same as the burden of production.[26] However, the burden of going forward may shift during the course of a trial,[27] and may impose different duties on the parties depending upon the type of proceeding.[28]

### 4. *Burden of Production.*

The determination of whether a party has satisfied the burden of production is a purely legal issue, which does not involve an assessment of the credibility of the evidence tendered.[29] The trial judge is merely asked to assess whether the

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[24] BLACK'S LAW DICTIONARY (8th ed. 2004).

[25] *Commercial Molasses Corp. v. NY Tank Barge Corp.*, 314 at 110-11.

[26] *Director v. Greenwich Collieries*, 512 U.S. at 272.

[27] *Barnes v. U.S.*, 412 U.S. 837, 846 n. 11 (1973); *Konigsberg v. California*, 366 U.S. 36, 40 n. 4 (1960).

[28] *Sandstorm v. Montana*, 442 U.S. 510, 515-16 (1979) (The Court noted that, since a directed verdict may not be directed against a defendant in a criminal case, the consequences for failing to meet a production burden is very different for prosecution and defense. *Id.* at 516 n. 5); *contrast with, Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 74 n. 5 (1978) (Court held in a civil matter that the FTC had met its burden of production while A&P failed to satisfy its burden that prices were cost justified).

[29] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993).

evidence introduced, if "*taken as true*, would *permit* the conclusion" sought by the party offering the evidence (*emphasis in original*).[30] The burden of production remains static through the duration of a case, and it refers to meeting a threshold of elemental proof before an issue can be submitted to the fact-finder.

### C. Implementation of the Refugee Act of 1980 has produced uncertainty concerning which burden an alien must satisfy before the Attorney General must exercise his discretion.

The Refugee Act of 1980 provides *inter alia* that "[a]ny alien who is physically present in the United States . . . irrespective of such alien's status, may apply for asylum."[31] In order to be eligible for asylum, an alien must demonstrate he:

> Is outside any country of such person's nationality . . . is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[32]

The Attorney General's regulation for establishing eligibility for asylum states, in pertinent part, that "[t]he *burden of proof is on the applicant* for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act (*emphasis added*)."[33] The regulation also provides, "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[34] An immigration judge

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[30] *Id.*

[31] INA § 208(a), 8 U.S.C. § 1158(a) (2001).

[32] INA 101(a)(42), 8 U.S.C. § 1101(a)(42) (2001 & Supp. II 2004).

[33] 8 C.F.R. 208.13(a) (2004).

[34] *Id.*

can, in his discretion, grant or deny asylum to an alien demonstrating he is eligible for relief an account of being a refugee.[35] However, due to the inclusion of the term "burden of proof" in 8 C.F.R. § 208.13(a) (2004), the statutory and regulatory framework is ambiguous whether an asylum seeker must meet a burden of production (i.e., a *prima facie* tender of proof that he is a refugee), a burden of going forward (i.e., a shifting burden to establish a *prima facie* case and to rebut contrary evidence), or a burden of persuasion which demands some lesser certainty of evidence than is required by INA § 243(h) (i.e., "more likely then not" standard").

In *Director v. Greenwich Collieries*, the Court inferred Congress intended "burden of proof" to mean "burden of persuasion" based upon the generally accepted meaning of the term at the time of enactment; in the context of the APA, this inference was logical and easily implemented. In the context of asylum, however, the same inference does not carry with it the same logic or ease of implementation. To the contrary, in the context of asylum it is more logical to infer that an asylum seeker need only meet a burden of production. The result necessarily follows from the observations that a "well-founded fear of persecution" is not-so-nearly well operationalized into a standard of proof. Further, the bar for eligibility for asylum was intentionally set low because, once an alien establishes eligibility, he has only earned the right to require the Attorney General to exercise discretion to grant or deny asylum.

Regrettably, *INS v. Cardoza-Fonseca*, only makes it clear that an asylum seeker does not have to prove by a preponderance of the evidence that he is a refugee,[36] without answering what type of burden must be met. Since this decision, federal courts and the BIA disagreed on the burden of proof and

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[35] 8 C.F.R. § 208.14(a) (2004).

[36] *INS v. Cardoza-Fonseca*, 480 U.S. at 428.

whether credibility is a factor is determining eligibility for asylum. Thus, reported decisions seemingly supporting a conclusion that an alien must meet a burden of persua sion has been issued by First Circuit,[37] Second Circuit,[38] Third Circuit,[39] Eighth Circuit,[40] Eleventh Circuit,[41] and the BIA.[42] Meanwhile, reported decisions seemingly supporting a conclusion that an alien must only satisfy a burden of production were issued by First Circuit,[43] Second

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[37] *See, e.g., Diab v. Ashcroft*, 397 F.3d 35 (1st Cir. 2005) (Petition for review was denied where immigration judge's determination of credibility negated *prima facie* evidence of claim for asylum); *Settenda v. Ashcroft*, 377 F.3d 89 (1st Cir. 2004) (Immigration judge's determination that alien did not satisfy burden of proof was affirmed based on lack of credible evidence).

[38] *See, e.g., Zhang v. U.S. INS*, 386 F.3d 66 (2nd Cir. 2004) (Court held an adverse credibility finding was sufficient to find alien failed to carry burden of proof); *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2nd Cir. 2004) (BIA's denial of asylum was affirmed, even through alien tendered a *prima facie* claim, because testimony at credible fear interview differed from testimony before the immigration judge); *We Biao Chen v. INS*, 344 F.3d 272 (2nd Cir. 2003) (Petition for review denied where adverse credibility discounted petitioner's *prima facie* claim for asylum).

[39] *See, e.g., Chen v. Ashcroft*, 376 F.3d 215 (3rd Cir. 2004) (Alien denied asylum based upon contradictions in testimony at credible fear interview and testimony before the immigration judge).

[40] *See, e.g., Kondakova v. Ashcroft*, 383 F.3d 792 (8th Cir. 2004) (Court held immigration judge properly denied asylum to Ukrainian family where incidents referred to in wife's testimony were not mentioned in her application for asylum) .

[41] *See, e.g., D-Muhumed v. U.S. A.G.*, 388 F.3d 814 (11th Cir 2004) (Immigration judge was justified in relying upon credibility assessment in denying alien's claim for asylum).

[42] *See, e.g., In Re M.D.*, 21 I&N Dec. 1180 (BIA 1998) (BIA held that alien bears the burden of proof to establish eligibility for asylum).

[43] *See, e.g., Mukamusoni v. Ashcroft*, 390 F.3d 119 (1st Cir. 2004) (Court held BIA erred by setting bar for establishing criteria for asylum too high); *Hernandez-Barrera v. Ashcroft*, 373 F.3d 9 (1st Cir. 2004)

Circuit,[44] Third Circuit,[45] Fourth Circuit,[46] Seventh Circuit,[47] Eighth Circuit,[48] Ninth Circuit,[49] Tenth Circuit,[50] and the BIA.[51]

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(Court remanded the case because BIA failed to consider evidence in record that satisfied the alien's burden of production).

[44] *See, e.g., Jin Shui Qiu v. Ashcroft*, 329 F.3d 140 (2nd Cir. 2003) (Court held BIA failed to consider evidence establishing burden of production); *Osorio v. INS*, 18 F.3d 1017 (2nd Cir. 1994) (Court held BIA failed to consider properly submitted evidence that supported alien's claim for asylum); *Michael v. Slattery*, 852 F. Supp. 211 (S.D.N.Y. 1994) (Immigration judge and BIA applied wrong standard to determine whether burden of production had been satisfied).

[45] *See, e.g., Leia v. Ashcroft*, 393 F.3d 427 (3rd Cir. 2004) (Court held alien's *prima facie* case could be satisfied by other means than those specified by INS regulations); *Berishaj v. Ashcroft*, 378 F.3d 314 (3rd Cir. 2004) (Immigration judge improperly denied asylum where evidence established that the alien had satisfied the burden of production).

[46] *See, e.g., Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004) (Evidence in record supported the alien had satisfied burden of production).

[47] *See, e.g., Lin v. Ashcroft*, 385 F.3d 748 (7th Cir. 2004) (Immigration judge failed to consider evidence in record when determining alien was not eligible for asylum); *Gontcharova v. Ashcroft*, 384 F.3d 873 (7th Cir. 2004) (Immigration judge failed to properly consider evidence in record when determining whether alien was eligible for asylum); *Ememe v. Ashcroft*, 358 F.3d 446 (7th Cir. 2004) (Court held testimonial inconsistencies were not sufficient to rebut alien's *prima facie* case for asylum).

[48] *See, e.g., Ahmadshah v. Ashcroft*, 396 F.3d 917 (8th Cir. 2005) (Alien's credibility was improperly considered where evidence clearly established he was a refugee); *El-Sheikh v. Ashcroft*, 388 F.3d 643 (8th Cir. 2004) (Decision to deny asylum because alien's claim was not supported by substantial evidence was reversed); *Awale v. Ashcroft*, 384 F.3d 792 (8th Cir. 2004) (Evidence supported alien had met burden of production, which was not rebutted by the government).

[49] *See, e.g., Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004) (Petition for review granted because adverse credibility did not rebut alien's *prima facie* case); *Kaiser v. Ashcroft*, 390 F.3d 653 (9th Cir. 2004) (Court concluded alien was eligible for asylum even though the immigration judge held the alien had not satisfied the burden of production); *Shire*

### D. The effect of the ongoing conflict in the law on the Petitioners' asylum case.

In this case, Kahn tendered evidence that he was a member of the MQM (a minority political party in Pakistan), he had been previously persecuted (i.e., arrested, detained, beaten, and interrogated) on three occasions, the past persecution was due to his affiliation with the MQM, his supervisor (Nasine Kahn) was arrested shortly before his departure from Pakistan, and shortly after his departure a warrant was issued for his arrest. Kahn testified he feared returning to Pakistan because he believed he would be beaten or killed, and that living in other parts of the country would not be any safer for him or his family. Kahn also submitted documentation corroborating his membership in the MQM, which provided some detail of his activities on behalf of the MQM, and it mentioned the PML's prior persecution of Kahn. Finally, Kahn submitted corroborating documentation reporting on the MQM's persecution by the PML.

Based upon the information submitted to the Immigration Judge, Kahn submits he had tendered a *prima facie* case that he was a refugee and was therefore entitled to the Attorney General's exercise of discretion. It is conceded that if Kahn had a burden of persuasion, the Immigration Judge's decision would have been proper; however, it is argued that Kahn was only required to satisfy a burden of production. The Immi-

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*v. Ashcroft*, 388 F.3d 1288 (9th Cir. 2004) (Court remanded the case to the immigration judge because decision was based on speculation and not on the evidence in the record).

[50] *See, e.g., Wiramsame v. Ashcroft*, 366 F.3d 889 (10th Cir. 2004) (Immigration judge erred in ignoring evidence in the record that established the alien's claim for asylum).

[51] *See, e.g., In Re A.E.M.*, 21 I&N Dec. 1157 (BIA 1998) (BIA reversed an immigration judge's funding that burden of production was not satisfied); *In Re O.D.*, 21 I&N Dec. 1079 (BIA 1998) (BIA reversed an immigration judge's decision to deny asylum based upon credibility).

gration Judge's decision is immutably clouded with his assessment of the credibility of Kahn's testimony, paltry corroboration of evidence, and lack of foundation and chain of custody for the written documentation; these observations all go to the weight of the evidence and not to whether the Petitioners satisfied their burden of production. While the Immigration Judge may ultimately have considered the relative weakness of the Petitioners' case while considering whether to grant asylum, the Immigration Judge's decision is clear that he never exercised his discretion (i.e., he failed to exercise his discretion) and denied asylum as if the Petitioners simply had failed to meet a burden of persuasion. Indeed, the Immigration Judge expressly stated, "that the respondent has failed to meet his burden of proof, to be accorded asylum."

The Immigration Judge's failure to exercise his discretion, and the resulting violation of the Petitioners' Due Process rights, is merely an exemplar of the rampant Due Process violations that have been occurring around the United States since this Court's decision in *INS v. Cardoza-Fonseca*. In short, only a ruling from this Court can provide uniformity in law by conclusively determining whether the burden of proof imposed on persons seeking eligibility for asylum has a burden of production, burden of going forward, or burden of persuasion.

## II. SOUND LEGAL POLICY COMPELS THE CREATION OF A FRAMEWORK FOR ASSESSING WHETHER AN ALIEN HAS SATISFIED THE BURDEN OF PRODUCTION.

The Petitioners submit that the proper standard for interpreting asylum claims is to infer that an applicant must only tender *prima facie* evidence that he is a refugee before the Attorney General is required to exercise his discretion in deciding to grant or deny asylum. Thus, Petitioners urge the Court to hold that an alien's eligibility for asylum should be

determined the same the way a trial judge would consider a Motion for Judgment As a Matter of Law asserted at the close of a civil plaintiff's case-in-chief. The Federal Rules of Civil Procedure provide in pertinent part that, during a trial, once:

> A party has been fully heard on an issue and there is no legally sufficient evidentiary basis . . . to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.[52]

In determining whether to grant a Motion for Judgment As a Matter of Law, the trial judge is constrained from making any determinations on the basis of the credibility of the evidence,[53] and must view all evidence in a light most favorable to the party opposing the motion.[54] The trial judge's paramount consideration is merely whether the evidence received by the court could support a particular fact.[55]

Review in this Court is necessary in order to achieve a uniform method of adjudicating asylum claims. After consideration, this Court's direction to the Attorney General and

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[52] Fed. R. Civ. P.50(a). It may be argued that Fed. R. Civ. P. 52(c) is more appropriate because this rule applies to non-jury trials; while it is true Fed. R. Civ. P. 52(c) is applicable to bench trials, Petitioners submit that FRCP 52(c) is only applicable when the plaintiff has a burden of persuasion. Judgments granted under 52(c) are appropriate where, for instance, a party must prove a fact by a preponderance of the evidence. If, at the close of the plaintiff's case, the judge does not feel the evidence was sufficient to prove the case by a preponderance of the evidence, albeit the plaintiff may have met his burden of production, the court may enter judgment without the necessity of the defendant offering rebuttal evidence.

[53] *This Is Me, Inc. v. Taylor*, 157 F.3d 139, 142 (2nd Cir. 1998).

[54] *Cobb v. Pozzi*, 363 F.3d 89, 101 (2nd Cir. 2004).

[55] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

future asylum seekers would be invaluable in determining whether asylum seekers have sufficiently proven their eligibility for asylum and to assess the character and quality of evidence necessary to invoke the Attorney General's discretion. Furthermore, only this Court can impose a concrete standard for assessing whether an alien has offered sufficient evidence to invoke the Attorney General's discretion.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, and the judgment of the United States Court of Appeals for the Fourth Circuit and the Board of Immigration Appeals should be reversed.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Baltimore, Maryland

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File No.: A 79 512 383/384/385
A 79 512 386/387/388

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In the Matter of
ABDUL AZIZ KHAN, ZAHIDA BERVINE, NAIDA BERVINE,
MOHAMMED FARID KHAN, ABDUL MAJID KHAN,
HINA BERVINE,
*Respondents.*

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In REMOVAL Proceeding

CHARGE: In each case, the respondent is charged under Section 237(a)(1)(B) of the Immigration and Nationality Act, nonimmigrant overstay.

In each case, applications for relief, Section 208 of the Immigration and Nationality Act, asylum;

Section 241(b)(3) of the Immigration and Nationality Act, withholding of removal;

Article 3, Convention against Torture, withholding of removal.

In the alternative, Section 240B of the Immigration and Nationality Act, voluntary departure.

ON BEHALF OF RESPONDENT:
David Agatstein, Esquire

ON BEHALF OF SERVICE:
Leslie Smith-Turner, Esquire

BENCH DECISION AND ORDER

The respondents are a family—a husband, a wife, and four minor children. All of the respondents arrived in the United States on October 15, in the year 2000, under nonimmigrant visitor for pleasure visas. Each respondent was permitted to remain in the United States until April 14, 2001. Each respondent has remained in the United States beyond that date without the authority of the United States Immigration and Naturalization Service in violation of their visas.

Each respondent has conceded to these facts, and in fact has conceded to the charge of removability as a non-immigrant overstay.

The plea of the four minor children has been accepted by the court through the custodial parents.

The principal respondent, the male respondent, Abdul Aziz Kahn, has filed an application for asylum, withholding of removal, protection under the convention against Torture, and in the alternative voluntary departure for his family.

The respondent claims that while in Pakistan, he was a member of the Mahajav Quami Movement, hereinafter MQM, and as a result of his active participation and activities, the respondent claims that he was arrested by authorities on three separate occasions, twice in 1995 and once in 1996.

The respondent claims that on one occasion in 1995 he was detained for three days; on the second occasion for a few hours, and on the 1996 arrest and detention for one week. The respondent claims that during each and every detention he was subject to interrogation, abuse, beatings, and torture. According to the respondent, they wanted to know why he was a member of the MQM and who the other members were and what they were doing.

The respondent claims that from 1996 until the time he left Pakistan, his activities with the MQM were reduced, that he

still had problems, but not as significant, and that when he came to the United States in October of 2000, he was coming here to protect himself and his family.

The respondent claims that just prior to his leaving Pakistan in October of 2000, the general manager of the PIA, that is, the Pakistani International Airline, was arrested and jailed. The respondent claims that he was aware of this the day after his superior was arrested, and that this influenced his departure. After his arrival in the United States, the respondent claims that he was informed by his brother that a warrant had been issued for his arrest in October of 2000, and the respondent believed that this was further political persecution because of his political activities.

The respondent claims because of his past MQM activities, because of his past arrests and detention, because of the warrant for his arrest, if he is returned to the Pakistan at this time he will suffer persecution.

On this record, the respondent asked the Court to approve his applications of asylum, withholding of removal, and protection under the Convention against Torture. Alternatively, the respondent has requested that he and his family be permitted to leave the United States voluntarily if the applications are denied. On this record, the respondent argues that he has been the victim of past persecution and has a well-founded fear of future persecution.

The Court has considered the respondent's application, his affidavit, the support of documents that were referred to the Court, and the respondent's testimony. Filed directly to the Court and considered is a copied letter from the MQM, claiming that the respondent was an active member; a second letter from his particular MQM unit, asserting that the respondent was an active member and helped organize meetings, "et cetera."

In addition, the respondent has presented background information regarding governmental treatment of MQM party members. *See* respondent's testimony and respondent's Group Exhibit IA through D.

The Immigration and Naturalization service has argued that the respondent has failed to meet his burden of proof to be accorded the relief that he seeks under applications of asylum, withholding of removal, protection under the Convention against Torture.

The burden of proof, of course, is upon the respondent. He must present credible and probative evidence that he is entitled to the relief that he seeks. To be granted asylum in the United States, the respondent must meet the legal definition of refugee, found at Section 101(a)(42)(A) of the Act. This evidence must show that he has been the victim of past persecution and/or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, political opinion. In this case, the respondent argues a claim of asylum under political opinion grounds.

In determining whether or not the respondent meets his burden of proof, the Court looks at the country at issue, its human rights record, applies a reasonable person standard, gives due consideration to any subjective fears that are expressed, provided they are genuine and supported by objective facts. Persons who have been victims of past persecution are deemed to have a well-founded fear of future persecution absent changed circumstance.

Asylum in the United States is an application of discretion. This means once the legal threshold has been established, the Court looks at favorable and unfavorable factors to determine whether or not respondent is worthy of a favorable exercise of discretion. To be accorded withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act, the

respondent's burden of proof is enhanced. He must show that it is more likely than not he will be persecuted, that his life, his freedom will be endangered, again, on account of a protected ground.

Withholding of removal under Section 241(b)(3) is not a discretionary application. If the legal threshold is established, the application shall be approved.

Protection under the Convention against Torture, Article 3, withholding of removal also requires an enhanced burden of proof. Again, the respondent must present evidence establishing that it is more likely than not that he will be tortured. Torture is defined under Article 3 of the Convention against Torture and also at 8 C.F.R. 208.18(a)(1). In part, that definition states the following: "Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him information or a confession, intimidating or coercing him, for punishment or discrimination of any kind. When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture."

Protection under the Convention against Torture is also a mandatory application; that is, there is no discretionary consideration. If the legal threshold is established, the application shall be approved.

Voluntary departure in the alternative requires that each respondent be persons of good moral character, that they must be ready, willing, and able to depart the United States, that they must have the necessary funds to remove themselves from the United States, that they must be able to post a departure bond in the amount of $500. Voluntary departure is an application of discretion.

All testimony and all evidence has been considered by the Court even if not specifically discussed below, and the Court has weighed all the testimony in evidence consistent with the statute at Sections 101(a)(42)(A), Section 208 and 241(b)(3) of the Immigration and Nationality Act, promulgated regulations, issued to implement our asylum, withholding of removal law, and our obligations under the Convention against Torture. *See* 8 C.F.R. 208.1 *et seq.*

The Court has also examined the testimony in evidence consistent with case law, to include the Supreme Court decisions of *INS v. Stevic*, 1984; *INS v. Cardoza-Fonseca*, 1987; *INS v. Elias-Zacarias*, 1992; 4th Cir. Court of Appeals precedent asylum cases; in *Yonghao Chen v. INS*, 1999; *Aragie v. INS*, 1998; *Ennin v. INS*, 1998; *Huaman-Cornelio v. Board of Immigration Appeals*, 1992; *M-A v. INS*, 1990; *Cruz-Lopez v. INS*, 1986; and Board of Immigration Appeals precedent decisions, to include *Matter of Acosta, Matter of Mogharrabi, Matter of Dass, Matter of S-M-J-, Matter of S-P-, Matter of E-P-, Matter of O-D-, Matter of N-M-A-, Matter of S-V-*, and cases cited therein.

After careful review of the testimony in evidence, this Court finds as follows:

The respondent has failed to meet his burden of proof to be accorded protection under the Convention against Torture.

The respondent has failed to meet his burden of proof to be accorded withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act.

The respondent has failed to meet his burden of proof to be accorded asylum under the Section 208 of the Immigration and Nationality Act.

The respondent has established eligibility for voluntary departure for himself and his family.

The Court concludes that the respondent has failed to meet his burden of proof to be granted asylum, withholding of removal, or the protection under the Convention against Torture, as it finds the explanations on the record not to be reasonable or plausible.

The respondent has provided to the Court basically a bare bones application. In response to any of the questions on his application for asylum, he refers to his affidavit. His affidavit is a very brief document that basically says that he was an MQM member and that he learned of warrant for his arrest in the year 2000, and because MQM members have been subject to abuse in his country, he dear being persecuted.

There is no mention in the respondent's application originally or his affidavit of three arrests and detention. When the respondent amended his application before the Court today, he merely inserted at Question 4, in response to: Have you or any member of your family ever been accused, charged, arrested, detained, interrogated, convicted, sentenced, imprisoned in your country, or any other country, including the United States? He amended the application to say: "I was arrested three times by the police in Pakistan." Yet, his application in answering the question "Yes," mentioned only that "Mohammed Kamin, my brother, was arrested about a year ago for his political activity, and he is still in jail in Pakistan."

The respondent's explanations as to why he failed to initially provide this information in his application and in his affidavit are simply not believed by the Court as it is not plausible. The question is a personal question. It asks the respondent directly if he or any members of his family had ever been arrested, and yet the respondent mentions only a brother and not himself.

In court today, he amends his application by saying he was arrested three times, but has provided no details initially in

his application or in his affidavit. He testifies to those arrests and detentions for the very first time.

There is no corroborative evidence presented to the Court to support his arrest and detention. Indeed, the letters from the MQM make no mention that the respondent because of his activities was subject to arrest and detention, or that there is a warrant issued for his arrest. His brother, who informed him here in the United States of his arrest has provided no affidavit to the Court confirming the warrant and no explanation is made in the record as to why such corroborative evidence is forthcoming.

The letter from the MQM indicates that the respondent was attacked by Muslim extremists. There is absolutely no mention in the respondent's application, nor, in fact, his application or his testimony today regarding any such alleged attacks.

The documents that the respondent presents to the Court are not reliable documents. No chain of custody has been offered to the Court to lend credence and reliability on these documents. There has been no authentication. There is no reliability. There is no foundation for these documents. In fact, the Court merely has copies of documents and no original documents of record.

There is no mention in the respondent's application or affidavit that he was charged under Article 242 of his country's law.

The respondent testified to the Court that he had repeated trips to the United States in the early 1990s and, in fact, came to this country in 1999. If this was the case, this was subsequent to the alleged three arrests. Yet, the respondent returned to Pakistan. He did not make application for asylum. He was unaware of a warrant for his arrest until he arrived in the United States. His arrival, as he indicated to the Court, was for purposes of providing safety and security for his family.

The respondent was employed by the Pakistani International Airline and represented under cross-examination that this is a government job, that he lived in government quarters. It is not particularly plausible to the Court that the respondent, who represents he was arrested and detained on three separate occasions, who has an outstanding warrant for his arrest from the very same government that apparently employed him and provided him housing.

The respondent was able to secure the necessary documentation to leave his country without any apparent difficulty or burden.

Quite simply, this case falls far short of the required evidence and corroboration to establish a bona fide claim for asylum, withholding of removal, or protection under the protection against the Convention against Torture.

The Court does not find the respondent's representations to be particularly plausible. His representations are limited, unconvincing, weak, and lacking in persuasive detail.

There is very limited corroboration in the record. In fact, the only corroboration is an indication of membership, with no corroboration regarding arrest, detention, abuse, or in fact a warrant.

This Court recognizes that Pakistan is a country that engages in considerable passion and violence in elections. In fact, the party that the respondent is allegedly affiliated with has been described as a violent political party. Pakistan as a nation is not on trial before the Court. The purpose of asylum is to provide sanctuary and protection to an individual who needs that sanctuary and protection while that sanctuary and protection is needed. The purpose of asylum is not to right the wrongs of the country in question.

In this record, the Court concludes, that the respondent has failed to meet his burden of proof, to be accorded asylum,

withholding of removal, protection against the Convention against Torture. These applications are denied to him and denied to his family as dependents.

The applications for voluntary departure shall be accorded to each respondent. Each respondent is required to leave the United States voluntarily at his/her expense on or before February 18, 2003, 60 days from today. Upon posting a departure bond in the amount of $500 for each case on or before December 24, 2002.

The Court notes in the record that it has already reviewed a valid passport, and those passports were made available to the government for their review had they chosen to review the same.

The presentation of a valid travel document is satisfied.

If the respondents fail to depart, if the respondents fail to post the bond within five business days, each respondent, without further notice and/or proceedings, shall be removed and deported from the United States to Pakistan.

And this Court so orders.

JOHN F. GOSSART, JR.
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JOHN F. GASSART, JR., in the matter of:

ABDUL AZIZ KHAN
ZAHIDA BERVINE
NAIDA BERVINE
MOHAMMED FARID KHAN
ABDUL MAJID KHAN
HINA BERVINE

A 79 512 383/384/385
A 79 512 386/387/388

Baltimore, Maryland

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Olga J. Papach
Olga J. Papach, Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

March 13, 2003
(complete date)

By submission of this CETIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

## APPENDIX B

IMMIGRATION COURT
31 HOPKINS PLAZA, ROOM 440
BALTIMORE, MD 21201

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Case No.: A79-512-387
IN REMOVAL PROCEEDINGS

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In the Matter of:

KHAN, ABDUL MAJEED,
*Respondent.*

---

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec. 17, 2002. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____ or in the alternative to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[X] Respondent's application for voluntary departure was granted until 2-18-03 upon posting a bond in the amount of $500.00, by 12-24-02 with an alternate order of removal to Pakistan.

[X] Respondent's application for asylum was ( ) granted (X) denied ( ) withdrawn.

[X] Respondent's application for withholding of removal was ( ) granted (X) denied ( ) withdrawn. Under INA § 241(b)(3) at ART 3, CAT.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ___ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ____ until ____.

[ ] As a condition of admission, respondent is to post a $____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[X] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: Valid passport reviewed.

Date: Dec. 17, 2002

Appeal: Waiver/Reserved Appeal Due By: 1/16/03

/s/ John F. Gossart, Jr.
JOHN F. GOSSART, JR.
Immigration Judge

## LIMITATION ON DISCRETIONARY RELIEF FOR FAILURE OT APPEAR

[ ] 1. You have been scheduled for a removal hearing, at the time and place set forth on the attached sheet. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years after the date of the final order of removal.

[ ] 2. You have been scheduled for an asylum hearing, at the time and place set forth on the attached notice. Failure to appear for this hearing other than because of exceptional circumstances beyond your control** will result in your being found ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for a period of ten (10) years from the date of your scheduled hearing.

[X] 3. You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act, and remaining in the United States beyond the authorized date other than because of exceptional circumstances beyond your control** will result in your being ineligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for ten (10) years from the date of the scheduled departure or the date of unlawful reentry, respectively. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and not more than $5000.

[ ] 4. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the INS, other than because of exceptional circumstances beyond your control** you will not be eligible for certain forms of relief under the Immigration and Nationality Act (see Section A, below) for ten (10) years after the date you are scheduled to appear.

** the term "exceptional circumstances" refers to circumstances such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BECOME INELIGIBLE ARE:

1) Voluntary departure as provided for in section 240B of the Immigation and Nationality Act;

2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

3) Adjustment of status of change of status as provided for in Section 245, 248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice must be given to the alien in his/her native language, or in a language he/she understands by the Immigration Judge.

Date:

Immigration Judge: John F. Gossart, Jr.

or Clerk Court: _____

## APPENDIX C

### DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

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File: A79-512-383—BALTIMORE Date: APR 15, 2004

In re: KHAN, ABDUL AZIZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Agatstein, David

ON BEHALF OF DHS: Leslie Smith Turner,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

## APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NOTICE OF JUDGMENT
December 29, 2004

TO: M. Jocelyn Lopez Wright, Esq.
Bryan Stuart Beier, Esq.
James Arthur Hunolt, Esq.
John Edward Gallagher, Esq.

Judgment was entered this date in Case Number(s): 04-1593

The Court's decision is enclosed.

PETITION FOR REHEARING (FRAP 40)
PETITION FOR REHEARING EN BANC (FRAP 35)

Filing Time

A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, any petition for rehearing must be received in the clerks office within 45 days after entry of judgment.

(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or other circumstances wholly beyond the control of counsel or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a petition for rehearing en banc is to be filed, it must be filed at the same time and in the same document as the petition for rehearing and must be clearly identified in the title.

Each case number to which the petition applies must be listed on the petition, even in companion or consolidated cases. Failure to list the individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing or petition for rehearing en banc will stay the mandate and toll the running of time for filing a petition for writ of certiorari.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals, and the conflict is not addressed in the opinion.

4. The proceeding involves one or more questions of exceptional importance.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies of a petition for rehearing en banc), and a copy of the Court's opinion must be attached to each copy of the petition.

BILL OF COSTS (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs on or before 01/12/05.

MANDATE (FRAP 41)

Issuance Time

In original proceedings before this Court, there is no mandate. Unless the Court shortens or extends the time, in all other cases, the mandate issues 7 calendar days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay the issuance. If the petition or motion is denied, the mandate will issue 7 calendar days later. If a stay or mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL CASES (Plan in Implementation of the CJA)

Criminal

In criminal cases, counsel must inform the defendant in writing of the right to file a petition or writ of certiorari from an adverse decision of this Court. Counsel appointed under

the Criminal Justice Act must file their vouchers within 60 days of entry of judgment, denial of a petition for rehearing, or the grant or denial of a petition for writ of certiorari, whichever is later.

PETITION FOR WRIT OF CERTIORARI (Sup.Ct.R. 13)

Filing Time

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. The petition must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from the issuance of the mandate. If a petition for rehearing is timely filed, the time runs from the denial of that petition. Content, fees, and number of copies of a petition for writ of certiorari are governed by the Rules of the United States Supreme Court.

JUDGMENT

[Filed: December 29, 2004]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

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No. 04-1593
A79-512-384
A79-512-385
A72-512-386
A79-512-387
A79-512-388
A79-512-383

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ABDUL AZIZ KHAN; HINA PARVEEN; ABDUL MAJEED KHAN; MUHAMMAD FAREED KHAN; NIDA PERVEEN; ZAHIDA PERVEEN,

*Petitioners*,

v.

JOHN ASHCROFT,
Attorney General of the United States

*Respondent*.

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On Petition for Review of an Order of the
Board of Immigration Appeals.

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In accordance with the written opinion of this Court filed this day, the Court denies the petition for review of an order of the Board of Immigration Appeals.

A certified copy of this judgment will be provided to the Agency upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 04-1593

---

ABDUL AZIZ KHAN ; HINA PARVEEN; ABDUL MAJEED KHAN; MUHAMMAD FAREED KHAN ; NIDA PERVEEN ; ZAHIDA PERVEEN,

*Petitioners*,

versus

JOHN ASHCROFT,
Attorney General of the United States,

*Respondent*.

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On Petition for Review of an Order of the Board of Immigration Appeals. (A79-512-383; A79-512-388; A-79-512-387; A79-512-386; A79-512-385; A79-512-384)

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Submitted: November 19, 2004 Decided: December 29, 2004

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Before NIEMEYER, WILLIAMS, and SHEDD, *Circuit Judges*.

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Petition denied by unpublished per curiam opinion.

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John E. Gallagher, Catonsville, Maryland, for Petitioners. Peter D. Keisler, Assistant Attorney General, James A. Hunolt, Senior Litigation Counsel, M. Jocelyn Lopez Wright, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Abdul Aziz Khan ("Khan") and his wife, Zahida Perveen, and their four children, Nida and Hina Perveen and Abdul Majeed and Muhammad Fareed Khan, natives and citizens of Pakistan, petition for review of the Board of Immigration Appeals' ("Board") order affirming, without opinion, the immigration judge's decision denying asylum and withholding of removal and denying relief under the Convention Against Torture. For the reasons discussed below, we deny the petition for review.*

The decision to grant or deny asylum relief is conclusive "unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D) (2000). We have reviewed the immigration judge's decision and the administrative record and find the record supports the conclusion. Khan failed to establish past persecution or a well founded fear of persecution. *See* 8 C.F.R. § 1208.13(a) (2004) (stating that the burden of proof is on the alien to establish his eligibility for asylum); *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). Because the decision in this case is not manifestly contrary to law, we cannot grant the relief Khan and his family seek.

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*PETITION DENIED*

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* The Petitioners do not challenge the immigration judge's denial of the applications for withholding of removal and relief under the Convention Against Torture.